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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ENVIRONMENTAL WASTE CONTROL, INC., d/b/a FOUR COUNTY LANDFILL, STEPHEN W. SHAMBAUGH, JAMES A. WILKINS, and WEST HOLDING COMPANY, INC.,

Petitioners

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

SUPPORTERS TO OPPOSE POLLUTION, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Is a federal district court's closure of a hazardous waste landfill under §6928(h)(1) of the Resource Conservation and Recovery Act ("RCRA") in conflict with both Congressional intent concerning decision-making about the permanent operating status of such landfills and prior decisions of this Court?

2. Have the courts below correctly decided novel, significant questions of federal environmental law to find that the petitioners lost interim status under RCRA, and if interim status was lost, does that warrant closure of the landfill?

3. Does an intervenor's failure to comply with the notice requirements of 42 U.S.C. § 6972 defeat the district court's subject matter jurisdiction over the intervenor's claims?

4. Does the defendant in an EPA enforcement action under RCRA have standing to object to a citizens' group intervention under 42 U.S.C. §9613(i)?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ENVIRONMENTAL WASTE CONTROL, INC., d/b/a FOUR COUNTY LANDFILL, JAMES A. WILKINS, STEPHEN W. SHAMBAUGH, WEST HOLDING COMPANY, INC.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and SUPPORTERS TO OPPOSE POLLUTION, INC.,
Respondents.

Petitioners Environmental Waste Control, Inc. d/b/a Four County Landfill, James A. Wilkins, Stephen W. Shambaugh, and West Holding Company, Inc. (collectively "EWC") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on October 31, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for

the Seventh Circuit is reported at 917 F.2d 327. The final judgment memorandum and order of the United States District Court for the Northern District of Indiana (Miller, D.J.) is reported at 710 F.Supp. 1172. The district court's memorandum and order addressing the parties' pre-trial motions for summary judgment and EWC's motion for dismissal of Supporters to Oppose Pollution, Inc.'s ("STOP") claims is reported at 698 F.Supp. 1422. The memoranda and orders of the district court addressing EWC's counterclaim against STOP, dated August 2, 1988, and granting STOP's amended motion to intervene, dated November 6, 1987, have not been reported.

Copies of all of these opinions are reprinted in the separate appendix.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The United States Environmental Protection Agency ("EPA") brought this suit

against EWC in the Northern District of Indiana pursuant to 42 U.S.C. §6928. STOP intervened pursuant to 42 U.S.C. §9613(i). The district court entered judgment against EWC on March 29, 1989.

EWC appealed. The Seventh Circuit Court of Appeals affirmed on October 31, 1990. No petition for rehearing was filed.

The jurisdiction of this Court to review the decision of the Seventh Circuit arises under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case include 42 U.S.C. §§6925(e)(2), 6926(d), 6928(h)(1), 6972(a)(1)(A) and (b)(1), and 9613(i). The regulations involved include: 40 C.F.R §§265.93(d)(1) and (2); 320 Indiana Administrative Code ("IAC") 4.1-20-2(a)(2); 320 IAC 4.1-26, 35, and 36; 320.1 IAC §§ 2-22-24(a) and (b); 329 IAC 3-34-5 and 12. These statutes and regulations are

reprinted in the appendix at the close of this brief.

STATEMENT OF THE CASE

A. Petitioners' Background

Environmental Waste Control, Inc., an Indiana corporation, owns and operates a hazardous waste landfill known as the Four County Landfill ("FCL"). FCL has been operated as a hazardous waste landfill since 1978. West Holding Company ("West") owns all of the outstanding stock in EWC and owns the FCL property. James Wilkins is a shareholder in West and the former owner of the FCL property. Stephen Shambaugh is president of Environmental Waste Control, Inc. and a shareholder in West.[1]

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[1]All the parties in this proceeding appear in the caption. West and Environmental Waste Control, Inc. have no other parent, subsidiaries or affiliates.

B. RCRA

In 1976, Congress passed the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., which directed EPA to establish a comprehensive federal program regulating disposal of hazardous waste. RCRA required that all persons who disposed of hazardous waste notify EPA of that activity by August 8, 1980. EWC timely so notified EPA.

RCRA also established a permitting procedure for hazardous waste landfills such as FCL. In "authorized" states (states with hazardous waste regulatory programs meeting federal standards) much of the permitting authority is delegated by statute and regulation to the state. 42 U.S.C. §6926. Indiana is an authorized state; the Indiana Department of Environmental Management ("IDEM") is the state agency charged with the permitting

responsibility. RCRA provides that "[a]ny action taken by a state under a hazardous waste program authorized under this section shall have the same force and effect as actions taken by the Administrator." 42 U.S.C. § 6926(d).

To determine if a landfill should be issued a permanent or "Part B" operating permit, a detailed, exhaustive examination of every aspect of the landfill is performed. This process can take several years. Because EPA and state agencies were unable to timely process all of the Part B applications and due to the pressing need for secure hazardous waste disposal capacity, Congress allowed facilities in existence prior to November 19, 1980, to continue to operate as "Part A" or "interim status" facilities while their Part B applications were pending. EWC timely submitted its Part A application and thus

automatically continued operation as an interim status landfill after that date.

Under 42 U.S.C. §6925(e), owners or operators of interim status facilities were required to submit application for their "Part B" permit by November 8, 1985. Owners or operators were required to certify by that same date that their facility was in compliance with all applicable groundwater monitoring and financial assurance requirements imposed under RCRA. EWC timely filed its Part B application and has supported that with thousands of pages of studies and technical materials. EWC also timely filed its certificate of compliance with EPA on November 7, 1985.

C. RCRA Financial Assurance

The financial responsibility provisions in force in November, 1985 stated in two different passages of the regulations:

The owner or operator must have and

> maintain liability coverage for sudden, accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs.
>
> * * *
>
> The owner or operator must have and maintain liability coverage for non-sudden, accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs.
>
> * * *

320.1 IAC §§ 2-22-24(a) and (b). As first proposed by EPA in 1981, the rules contained an express requirement that "combined limits" policies -- those combining sudden and non-sudden coverages -- total $4 million per occurrence and $8 million aggregate. Trial Transcript ("Tr."), 3370. When the final rule was promulgated in 1982, that provision was deleted. Tr. 3731. In September, 1988, that express provision was reinserted into

the rule. EWC Trial Exhibit ("Ex.") P-1.

EWC had liability insurance in place on November 7, 1985, obtained from the St. Paul Surplus Lines Insurance Company ("St. Paul"). District Court Opinion ("Dist. Ct.") at 73. The St. Paul policy covered both sudden accidental and non-sudden accidental occurrences in the amounts of $3 million per occurrence, $6 million annual aggregate. Dist. Ct. at 73. No claim was made on EWC's policy between November 7, 1985 and June 28, 1986, when EWC replaced it with a policy with separate coverages totalling $4 million/$8 million. Dist. Ct. at 168.

The St. Paul policy contained an Endorsement 3, which stated:

* * *

> The insurer will issue certificate(s) of liability insurance attesting to the insured's compliance with local, state, or federal environmental financial responsibility obligations.
>
> It is further agreed that:

1) The issuance of such certificates shall in no way be interpreted to modify the terms, conditions and obligations between the insured and the insurer under this policy.
2) The insured shall reimburse the company for any and all amounts assessed against, incurred by or paid by the company on behalf of the insured:

* * *

(B) Which do not fall within the coverages afforded by the policy, tc which this endorsement forms a part.
3) As respects the limit of liability stated in Item VI of the policy declarations:
(A) When a certificate(s) of liability is/are issued, the limits of liability stated therein for each occurrence/ annual aggregate shall be available under this policy for coverage of environmental impairment liability in accordance with the applicable local, state or federal environmental financial responsibility obligations... However, the total limits of liability as stated in Item VI... are the maximum limits available to the insured under this policy.

EWC also had obtained a policy from Pacific Insurance Company with an initial policy period of June 28, 1982 to June 28, 1983. Ex. D-6 (not admitted). That policy was never cancelled.

FWC's insurance broker called EPA's hotline on November 13, 1984 to find out how much coverage was needed. Dist. Ct. at 87. He was told a $3 million/$6 million combined sudden and non-sudden accidental occurrences policy would suffice. Dist. Ct. at 87.

IDEM supervises compliance with RCRA financial assurance in Indiana. IDEM's internal reports show that the St. Paul policy was reviewed by IDEM on January 21, 1986 and EWC was found by IDEM to be "in compliance for 1986." Ex. J-5 and J-1.

D. Groundwater Monitoring

The interim status groundwater monitoring regulations in force in November, 1985 and at present require placement of at least three downgradient monitoring wells "at the limit of the waste

management area" in order that "they immediately detect any statistically significant amounts of hazardous waste or hazardous waste constitutents that migrate from the management area to the uppermost aquifer." 320 IAC 4.1-20-2(a)(2).

There is no provision in the regulations that more specifically identifies where wells have to be located. Proper placement of such wells is dependent upon site characteristics. No final formal EPA guidance was available on the groundwater monitoring regulations until September, 1986.

EWC placed all of its groundwater monitoring wells pursuant to advice from its expert consultants. Dist. Ct. at 94. ATEC Associates, Inc., a well known hydrogeologic consulting firm, issued reports in 1983 and 1985 with test results describing the basis for EWC's well

placement. Dist. Ct. at 94. ATEC opined that the system installed complied with interim status groundwater monitoring requirements. Another nationally known hydrogeologic consulting firm, Dames & Moore, supplemented those reports and made further studies of the site in 1986 and 1987. Dist. Ct. at 94. All of EWC's consultants, whose advice EWC uniformly followed, agreed that EWC's groundwater monitoring system complied with the interim status groundwater monitoring requirements.

Based on an apparent statistical difference in certain chemical data from upgradient and downgradient wells in September, 1984, EWC notified IDEM and EPA that it was entering into an "assessment" groundwater monitoring program. Dist. Ct. at 96. As part of the assessment program, three more wells were installed in April, 1985. Dist. Ct. at 96. The resulting 6-

well system was analyzed by ATEC and submitted to IDEM in August, 1985, in conjunction with EWC's assessment program. This was the interim status well system in place on November 7, 1985.

In October, 1984, IDEM had initiated an administrative action, Cause N-128, alleging certain deficiencies in EWC's interim status groundwater monitoring system. That was resolved by a consent decree entered in July, 1985. Dist. Ct. at 96. The consent decree followed up on EWC's assessment program, called for submission of a detailed groundwater monitoring plan and required IDEM approval for the placement and installation of further groundwater monitoring wells. Dist. Ct. at 96. EWC timely submitted its plan in August 1985. Dist. Ct. at 96. IDEM did not respond until October, 1986. Dist. Ct. at 100. IDEM agreed that the

consent decree totally controlled EWC's groundwater monitoring efforts, and that EWC was in compliance with the terms of N-128 on November 7, 1985. Ex. S-6, Tr. 3681-82. Continued communications with IDEM and EPA finally culminated in a well system being approved by IDEM on July 28, 1988. That system was installed in late 1988 and early 1989. Dist. Ct. at 101, 121, n.45.

That system is now fully operational. Its installation generated a good deal of new hydrogeologic data which affirmed EWC's understanding of the aquifers beneath the FCL and that its monitoring system was sound. The district court refused to admit this data. Tr. 3583, 3592. Installation of the new system cost hundreds of thousands of dollars.

E. Other Aspects of the FCL and Hazardous Waste Disposal

All wastes deposited at FCL since

August, 1986 have been placed in cells which have double synthetic liners which meet or exceed EPA's minimum technology requirements for safety and protection of the environment. EWC has invested hundreds of thousands of dollars in the construction of these cells. At the time the district court closed FCL there was substantial unused capacity in those cells. When the district court closed FCL, EWC employed approximately 20 people.

There is a great need for secure hazardous waste disposal space, both in Indiana and nationally. FCL was one of only two commercially available hazardous waste landfills in Indiana. EWC attempted to introduce detailed evidence on the great and increasing need for such landfill space, but the district court refused to admit any such evidence. Tr. 3867, 3873, 3921.

F. The Lawsuit

On February 2, 1987, EPA brought this action against EWC pursuant to 42 U.S.C. §6928, alleging (1) that EWC had lost interim status as of November 8, 1985, for lack of sufficient liability insurance and a satisfactory groundwater monitoring system and (2) that EWC had unlawfully laterally expanded the landfill by placing hazardous waste in new unlined cells after May 5, 1984, the last date such disposal could be made in new unlined cells (existing cells in use could continue to be filled). In an amended complaint, filed June 22, 1987, EPA alleged in addition (3) that EWC had failed to implement a groundwater monitoring program capable of determining FCL's impact on the quality of the groundwater in the uppermost aquifer and (4) that the groundwater under FCL was contaminated and corrective action was

required. EPA sought temporary closure of FCL (because of alleged loss of interim status), installation of a groundwater monitoring system, and a civil penalty. EPA never sought a permanent injunction to prevent EWC's continued operation of FCL.

STOP moved to intervene. EWC opposed both STOP's original and amended intervention motions. The district court granted STOP's amended motion to intervene under 42 U.S.C. §9613(i) on November 6, 1987. STOP gave no notice to the state of Indiana before it filed its complaint.

STOP's complaint incorporated by reference EPA's complaint and added eleven other claims. STOP asked the district court to permanently close FCL, to impose penalties, and to award STOP its attorney's fees.

After a bench trial the district court entered a Memorandum and Order on March 29,

1989. The district court held that it had jurisdiction over all of EPA's and STOP's claims; that FCL lost interim status because its insurance coverage and groundwater monitoring system were insufficient to meet the requirements under RCRA at the time EWC certified compliance in November of 1985; that EWC had an inadequate groundwater monitoring system as of the start of trial; that hazardous waste constituents had been released into the groundwater beneath FCL and corrective action was required; and that hazardous waste constituents had been released into the environment beyond FCL boundaries by wind dispersal and surface water. The court essentially rejected the rest of STOP's claims.

The district court (1) permanently enjoined the defendants from operating FCL and ordered them to submit and implement a

closure plan; (2) ordered the defendants (except Wilkins) to undertake corrective action to address the release of hazardous waste constituents into the groundwater; and (3) ordered the defendants to pay civil penalties amounting to $2,778,000.00 and reasonable attorney fees and expenses incurred by STOP.

EWC appealed to the Seventh Circuit. Unable to generate operating income by operating and beset by the liabilities imposed by the district court, FCL filed a Chapter 11 petition. The Seventh Circuit entered an order affirming the district court on October 31, 1990.

REASONS FOR GRANTING THE WRIT

I. The Permanent Closure Injunction Disrupts the RCRA Statutory Scheme and Conflicts with the Decisions of this Court.

The district court's injunction permanently barring EWC from operating FCL

was wrong for many reasons, but two in particular warrant review. First, the injunction obliterates the distinction in RCRA between interim status and permanent Part B permit decision-making. In essence, the federal district court in South Bend decided that EWC shall never operate FCL. That decision about permanent operating status was a decision Congress has expressly delegated to EPA and IDEM utilizing criteria that the South Bend court never applied or had before it. This kind of federal court governance disrupts the statutory framework, relegates to the judiciary powers meant to be exercised by expert executive agencies, and is unfair to citizens seeking permits in the fashion contemplated by statute. This is an unprecedented holding raising an important question of federal law not previously addressed by this Court, with implications

in all areas of environmental law.

Second, the courts below assessed the permanent injunction in a fashion directly contrary to the careful balancing of public and private interests mandated by this Court in its decisions in Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798 (1982) and Amoco Production Co. v. Gambell, 480 U.S. 531, 107 S. Ct. 1396 (1987). The Seventh Circuit -- in conflict not only with this Court's precedents but also with numerous other Circuits -- erroneously suggested that no balancing was necessary. It equally erroneously stated that a balancing occurred in the district court, even though that court excluded or failed to consider directly relevant evidence.

A. The closure injunction is inconsistent with RCRA's statutory framework and relegates to the federal district court a decision properly made by federal and state environmental agencies.

In the RCRA Part B procedure, IDEM and EPA are to consider a number of highly technical factors, including many, such as design of the disposal cells, compatibility of liner materials with waste, and adequacy of the leachate collection system, that the district court did not have before it. 329 IAC 3-34-5 and 3-34-12. The Part B process was well underway for FCL.[2]

While in interim status, a facility is subject to an enforcement action if it violates any rule. That is the kind of enforcement action EPA brought below. Under § 6928(h), the relief in such an action can include "a temporary or

[2]EWC's initial Part B applications were denied; appeals are now pending.

permanent injunction." The point is not that permanent injunctive relief is not authorized in such enforcement actions -- plainly it is, for example to enforce compliance or to require certain actions -- but that an injunction permanently closing a facility is not authorized. That kind of injunction renders the Part B process meaningless. It usurps to a federal district court powers expressly delegated to expert government agencies.[3] EPA as much as acknowledged that permanent closure was

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[3]As EWC argued below, to the extent there is any legislative history on this provision of RCRA -- and there is little -- it indicates that this injunction power was designed to compel compliance with RCRA, not to permanently close RCRA facilities in derogation of the Part B process. See p. 30 to the House Report on RCRA, 1976 U.S. Code Cong. and Adm. News at 6268, and the Department of Justice's statement that injunctions coupled with penalties would be used for "minor or unknowing or correctable violations." Id. at 6321. Neither the statute nor its legislative history suggests Congress intended courts to consider injunctions without balancing interests.

not consistent with the statutory framework by its not seeking such relief.

The injunction violates a variety of important principles embodied in RCRA. First, the district court takes away decision-making power left to a state agency, thus eroding the balance of federal and state authority established in RCRA. Second, it disrupts a similar balance between executive branch agencies and the federal judiciary, which lacks the experience and expertise necessary to make sound permanent permit decisions. Third, it gives past violations excessive weight relative to critical factors such as design, plans, and potential capabilities that go into the administrative agencies' Part B decision. Finally, it unfairly penalizes permit seekers in two ways: (1) it requires them to win an interim status lawsuit to get a Part B permit,

which is unfair because interim status is not a prerequisite to a Part B permit; and (2) it deprives them of the fair chance to obtain a Part B permit in the way prescribed by statute and regulation.

The Seventh Circuit completely ignored this issue. Proper resolution is critical to sound federalism, the integrity of the statutory framework Congress created in RCRA, and a fair and proper balance between environmental enforcement and permitting.

B. The lower courts' failure to accept evidence on and balance the public and private interests affected by permanent closure violates the clear precedents of this Court.

Even if a permanent closure injunction was an appropriate remedy in this RCRA interim status enforcement case, the weighing of public and private interests mandated by this Court in Romero-Barcelo and Gambell did not occur. Moreover, the

Seventh Circuit's opinion suggests that balancing is not necessary. App. Ct. at 7. There is a conflict between this Court's precedents and the decisions below. The Seventh Circuit's position also sharply conflicts with many other Circuits' balancing application of Romero-Barcelo and Gambell. See, e.g., NRDC v. Texaco Marketing, 906 F.2d 934, 937-39 (3rd Cir. 1990) and cases cited in similar cases from the Second, Ninth, District of Columbia and Eleventh Circuits requiring balancing under several different environmental statutes.

The district court failed to consider or refused to admit evidence on a variety of important interests:

1. It refused to admit evidence of the great need in Indiana and nationally for secure hazardous waste disposal capacity. Tr. 3867, 3873, 3921.

2. It failed to consider that all wastes currently deposited at FCL are going into cells exceeding EPA's minimum technology requirements for protection of the

environment.

3. It failed to consider the effect of the extensive new monitoring well system approved by IDEM and installed by EWC on future operations of the Landfill. Lovell v. Brennan, 728 F.2d 560 (1st Cir. 1984) (courts are required to consider up to the minute conditions in weighing requests for injunctions).

4. It failed to consider the value of FCL to the larger community, the effect on businesses dependent on FCL for disposal needs, and the possible increase in improper disposal produced by closure of one of only two commercially available hazardous waste landfills in Indiana.

5. It failed to consider new groundwater level and other data generated during installation of the well system that showed that FCL's monitoring wells were correctly placed. Tr. 3583, 3592.

6. It gave inadequate weight to EWC's efforts to comply with regulatory requirements, such as its extensive use of and obedience to expert consultants, a factor many other courts have held to be important. E.g., State of Wisconsin v. Weinberger, 745 F.2d 413, 424 (7th Cir. 1984).

7. It failed to consider whether a less drastic remedy could cure prospective problems. C.f.,

Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1123 (7th Cir. 1976).

8. It refused to consider the impact of closure on the employees and families of employees of the landfill. TR 2701, 2702 (offer to prove).

The Seventh Circuit did not address any of these points. Instead, it held that because the district court included a sentence in its 185-page opinion that says the court balanced risk against harm, it must have done so. App. Ct. at 6. That will not suffice. The balancing must be real, not conclusory and exclusive.

The Seventh Circuit suggests that balancing was not necessary where a defendant's conduct is "willful." App. Ct. at 7. Even if EWC had willfully failed to comply, that would not avoid the need to balance. The Navy in Romero-Barcelo, for example, deliberately discharged ordnance into the ocean without a permit, violating

environmental statutes. Nonetheless, this Court required a balancing of interests.

The Seventh Circuit cites Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983) as stating that no balancing is needed where a government or private attorney general is seeking an injunction. App. Ct. at 7. Romero-Barcelo, which Lamphier does not discuss, destroys that excuse. In Romero-Barcelo the plaintiffs included the governor of Puerto Rico and others plainly serving as private attorneys general, if not public officials. 456 U.S. 307. Similarly, in Gambell the plaintiffs were two Alaskan villages. 480 U.S. 535. Nowhere in these cases is there any suggestion that balancing is not required if a private

attorney general is seeking an injunction.[4]

Ironically, the district court's closure order advances no environmental good. At a time when disposal space is increasingly dear in Indiana and nationally, the order blocks further disposal in a technically sound cell with an approved monitoring system. By eliminating a valuable, secure landfill, the practical effect of the injunction may be to increase unlawful disposal.[5] By barring further operations the district court prevented EWC from generating revenues needed for further corrective

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[4] In Lamphier the injunction compelled compliance rather than closure. Lamphier actually illustrates the proper application of a compliance injunction.

[5] Largely because of adverse publicity, EWC was forced to offer disposal space at rates below those of competitors. Sharp increases in disposal costs arising from closure of FCL may force businesses to choose between ceasing operations or unlawful disposal.

measures.

The decisions below violate the equitable core of Romero-Barcelo and Gambell. They authorize permanent closure without a real balancing of interests and suggest that no balancing is needed. This Court should resolve the conflict betewen the courts below and numerous other Circuits and clarify that the lessons of Romero-Barcelo and Gambell are vitally important and must be applied even -- or perhaps especially -- in cases involving entities as environmentally essential and yet unpopular as hazardous waste landfills.

II.

The Erroneous Decision that EWC Lost Interim Status Presents Novel Questions of Federal Environmental Law of Great Importance that Should be Settled by This Court.

This case "involves several issues of law on which no court has ruled before." Dist. Ct. at 1. Among the most important

of these are whether the FCL should be closed because EWC lost "interim status." The courts below ruled that FCL lost that status because it lacked adequate liability insurance and a satisfactory groundwater monitoring system as of November 7, 1985, when FCL certified compliance with these requirements. This decision was both legally wrong and unjust. Moreover, the district court held it must automatically apply a remedy -- closure -- inconsistent with the balancing approach of cases from this Court such as Romero-Barcelo. The Seventh Circuit embraced those errors, without even addressing important issues raised by EWC.

A. EWC Had Sufficient Liability Insurance.

For at least five independent reasons, EWC had sufficient liability insurance on November 7, 1985.

1. The regulation in force in 1985 required only $3 million/$6 million on

a "combined limits" policy, or at a minimum was ambiguous as to the requirement for a "combined limits" policy.

The courts below concluded that the RCRA regulations plainly required a total of $4 million per occurrence/$8 million annual aggregate ($1 million/$2 million for sudden occurrences plus $3 million/$6 million for nonsudden occurrences). That is not correct.

EWC had a "combined limits" policy with St. Paul Insurance Company, which provided $3 million/$6 million total limits, applicable to both sudden and non-sudden occurrences. The 1985 financial assurance regulations nowhere expressly stated that a total of $4 million per occurrence and $8 million annual aggregate was required for such a combined limits policy. When proposed in 1981, the regulation contained a provision expressly requiring a total of

$4 million per occurrence and $8 million aggregate if a "combined" policy like EWC's was used. That provision was eliminated when the final rule was published in 1982. Only subsequently, on September 1, 1988 was the regulation amended to again include a totaling requirement.

The Seventh Circuit totally ignores the 1982 deletion. The deletion had great significance. Link-Simon, Inc. v. Muehleback Hotel, Inc., 374 F.2d 789, 794-95 (5th Cir. 1974) (courts must presume intent from deletion of provisions in prior forms of a law). The regulated community justly looks at the development of a regulation to determine what it means. The regulated community widely construed that deletion to sanction $3 million/$6 million combined limits policies, and EPA officials concurred. Tr. 3722.24. "The meaning attached by people affected by an act may

have an important bearing on how it is construed." Sutherland, Statutory Construction, § 49.06, p. 390 (4th Ed. Sands 1973). What other sensible explanation is there for the deletion?

At the least, the regulation was ambiguous. Why else would EPA make a "clarifying" amendment after this lawsuit was filed in 1988? EWC tried to present evidence of that ambiguity, but was erroneously prevented from doing so. Given ambiguity, the district court should have adopted a saving construction, not one which closed EWC. United States v. Messner, 428 F. Supp. 538 (E.D. Pa. 1977).

2. Since IDEM approved EWC's 1985 coverage, the courts below were wrong to rule EWC failed to comply.

IDEM, the agency with first-hand responsibility to administer and enforce RCRA financial assurance in Indiana,

approved EWC's 1985 coverage. Pursuant to 42 U.S.C. § 6926(d)[6], that assessment is binding on EPA. How can a regulated entity know it needs more coverage if the state agency administering the program reviews and by its non-objection tells the entity that its coverage is fully adequate?

3. EPA was estopped from contending that EWC did not have enough insurance.

EPA's "hotline" told EWC's insurance broker that a combined $3 million/$6 million policy would suffice. Based on that representation, EWC obtained such a policy. Those facts estop EPA from asserting EWC's policy was inadequate.

The reasoning of the courts below that EWC did not reasonably rely on the "hotline" is incorrect. EPA widely

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[6]This section provides "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter."

publicized the "hotline" as a means to answer questions about RCRA regulations. Tr. 3240, 3768.

EPA should not be allowed to use its bad advice against EWC in a subsequent enforcement action. As the Seventh Circuit held long ago in U.S. v. Fox Lake State Bank, 366 F.2d 962 (7th Cir. 1966), estoppel is appropriate where government has induced a private party to take an action which the government now wants to attack as illegal. The Seventh Circuit ignored Fox Lake. The only case it cited, Crown v. United States R.R. Retirement Bd., 811 F.2d 1017 (7th cir. 1987) involved efforts to get funds from the public treasury to which the party asserting estoppel was not entitled, a long-acknowledged limitation on estoppel. A s this Court indicated in Heckler v. Community Health Services of Crawford, 467

U.S. 51, 61 n. 13, 104 S.Ct. 2218 (1984), citing Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970), "To say to these [defendants], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." It was fundamentally unfair to refuse to estop EPA from avoiding its own advice to EWC in order to put EWC out of business.

4. Endorsement 3 to EWC's 1985 policy provided an assurance of funds adequate to meet RCRA requirements.

Endorsement 3 of EWC's 1985 policy provided (1) that St. Paul will certify to EWC's compliance with financial assurance requirements and (2) that if St. Paul must pay out more than the agreed limits, then St. Paul has a right of action to recover from EWC the excess paid. The Seventh Circuit's cursory analysis that the endorsement "does not modify" the policy misses the point. The Endorsement does not

increase policy limits; it does not increase the amount of money that St. Paul agreed it will pay out in return for the premium paid, but it does provide for compliance coverage, subject to an express right of St. Paul to recover from EWC what is paid out over policy limits.

EWC's policy thus is like the policy in Winecoff v. Nationwide Mutual Ins. Co., 223 Tenn. 267, 444 S.W.3d 84 (1969) and many similar cases involving governmental compliance endorsements. Those cases hold that policies purporting to offer compliance with financial responsibility laws are to be construed to provide that required coverage, irrespective of contrary limitations or terms in the policy.

At a minimum, Endorsement 3 is ambiguous. No one has suggested a different construction of the Endorsement that gives it any purpose. The courts

below should have construed the Endorsement in favor of insurance, Golblatt Brothers, Inc. v. Home Indemnity Co., 773 F.2d 121, 125 (7th Cir. 1985), to give it effect, Myers v. Mernmach Mutual Fire Ins. Co., 788 F.2d 468 (7th Cir. 1986), against the carrier which drafted the provision, and in favor of compliance with the regulation, Bocek v. Inter-Insurance Exchange of the Chicago Motor Club, 175 Ind. App. 69, 369 N.E.2d 1093, 1098 (1977).

5. EWC had additional coverage afforded by a 1982 policy which never was cancelled.

A final reason EWC had adequate insurance coverage is that a 1982 policy issued by Pacific Insurance Company was never cancelled. Pursuant to 320 IAC 4.1-22-34(e) and 35(e) and Endorsement 3 of the Pacific policy, that policy only could be terminated after notice was given to EPA and IDEM. No notice was given. Where the

law and insurance policy provide that the policy may not be terminated except upon notice, the policy continues in force until such notice is given. See, e.g., United States Fidelity & Guaranty Co. v. Security Fire & Indemnity Co., 248 S.C. 307, 149 S.E.2d 647 (1966). Together with the St. Paul policy, this policy, with limits of $1 million/$2 million, furnished more than enough coverage for EWC.

The district court, citing "undue delay" under Fed. R. Evid. 403, refused to admit evidence on the Pacific policy. Given the dispositive effect of the Pacific policy, the district court should have let the evidence come in and given EPA time to rebut. The Seventh Circuit, with absolutely no basis, concluded that the policy "had probably expired" and agreed that EWC waited too long to identify this policy as a potential complete answer to

EPA's coverage shortfall allegations. App. Ct. at p. 11. To the contrary, all the evidence and law was that the policy had not expired. The undue delay basis for exclusion is unsound[7] and hardly "substantially outweighs" the probative value of the evidence as required by Rule 403.[8]

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[7]EWC included the Pacific policy in its pretrial exhibit list and book. EWC's contentions submitted in the pretrial order stated that other policies added to the St. Paul policy to satisfy even EPA's construction of RCRA's limits. The fact that the issue first was articulated in full form on the 28th day of trial -- EPA had been informed days earlier -- was largely a result of a lengthy trial and the fact that EWC presented its case last. EWC's counsel explained why any delay had occurred, namely prior indications that the policy had been cancelled. Tr. 4097-98.

[8]Courts long have warned against "an unhealthy preoccupation with the clock." See, e.g., Flaminio v. Honda Motor Company Ltd., 733 F.2d 463, 473 (7th Cir. 1984); Sternberg Dredging Company v. Moran Towing & Transportation Company, 196 F.2d 1002, 1004 (2nd Cir. 1952); J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 403[01]. Impatience with counsel over the length of a trial is no justification for exclusion of a critical piece of evidence. See Bower

B. EWC Was in Compliance With the RCRA Groundwater Monitoring Regulations as They Applied to EWC on November 8, 1985.

The district court decided EWC's groundwater monitoring system as of November 8, 1985, was inadequate, essentially because although EWC had six (6) monitoring wells in place (three more than the required minimum), they were too far from the edge of the waste management area. The Seventh Circuit found that there was adequate support for that determination, and affirmed the district court. App. Ct. at 11-13.

EWC is not asking this Court to reweigh technical evidence. But the decision should be reversed for two critical reasons, both of which the Seventh Circuit neglected.

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v. O'Hara, 759 F.2d 1117, 1123-24 (3rd Cir. 1985).

First and foremost, the courts below judged EWC by the wrong regulatory standard. They put EWC out of business for not installing wells by November 8, 1985 that EWC could not lawfully have installed by that date. In September 1984, pursuant to 40 C.F.R. § 265.93(d)(1), EWC notified EPA and IDEM that, based on an apparent statistical difference in groundwater monitoring results, it was going from a "detection" into an "assessment" groundwater monitoring mode. The assessment mode requires preparation of an assessment plan, which controls all further monitoring at the site.

In October, 1984 IDEM sent EWC a notice of violation concerning groundwater monitoring requirements which ultimately was resolved by a consent decree in an administrative proceeding, Cause N-128, in July, 1985. That decree, consistent with

the assessment program requirements set forth in 40 C.F.R. § 265.93(d)(2), called for submission of a detailed groundwater monitoring plan. After IDEM review and change, a new monitoring system was to be installed. Until IDEM approval was given, no new wells could be installed.

EWC submitted its plan timely in August, 1985. IDEM did not act on the plan until thirteen months later. Further negotiations with IDEM and EPA finally culminated in a new well system being approved by IDEM in July, 1988 and installed in late 1988 and early 1989.

The regulations governing the assessment mode have no set requirements; exactly how assessment monitoring proceeds is left to the discretion of the agency, in this case IDEM. IDEM established the details of EWC's program in the N-128 consent decree. At trial, IDEM

specifically conceded that, well past November 1985, EWC was in compliance with the assessment mode as given substance in the N-128 consent decree. Tr. 3681-82.

EWC's evolution to a fully approved interim status groundwater monitoring system is typical. As the testimony at trial showed (and would have shown in more detail had evidence about other sites not been erroneously excluded, Tr. 3493), it is commonplace for monitoring systems to upgraded through an ongoing series of negotiated, phased implementations of new systems.

The district court incorrectly held that all this was irrelevant, because the assessment monitoring could not possibly be less stringent than detection monitoring. That misses the issue. The point is not that one is more or less stringent, but that they are different modes, governed in

a different way.[9] Once EWC was in the assessment mode as defined in the N-128 consent decree, that mode governed how EWC could meet the interim status groundwater monitoring requirements.

EWC has been put out of business by contradictory demands by two regulatory agencies. Under N-128, IDEM required prior approval of any new wells, and set up a phased program for submission of proposals, with which EWC was in full compliance as of November 8, 1985. Several years later, EPA

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[9]40 C.F.R. § 265.93(f) highlights the distinction. It says an operator must annually evaluate surface water elevations to determine if the requirements of 40 C.F.R. § 265.91(a) -- the detection mode -- are being met, "[u]nless the ground water is monitored to satisfy the requirements of § 265.93(d)(4)" -- the assessment mode. In other words, an operator must annually evaluate surface water elevations unless it is in the assessment mode. This provision highlights that when you are in one mode, you are not in a subset of the other mode. As to the mode of groundwater monitoring in which EWC found itself in November, 1985, it was in compliance.

sued to put EWC out of business because EWC did not put more wells in on a date when IDEM had not responded to EWC's timely proposal and EWC could not put in new wells.

There is a fundamental unfairness here which the Seventh Circuit did not address. Under principles of collateral estoppel, or under 42 U.S.C. § 6926(d), or just basic equity, EWC should not be destroyed by incompatible agency requirements.

A second reason the district court's decision was incorrect is that it adopted too narrow a definition of "waste management area." This is an issue of first impression. The regulation is not specific.

EPA's interpretation in 1985 was that § 264 (Part B) and § 265 (interim status) definitions of waste management area were essentially the same: "the limit projected

to the horizontal plane of the area on which waste will be placed during the active life of a regulated unit." Dist. Ct. at 107. That means wells placed, as some of EWC's were, at the limits of such projected disposal areas were properly positioned. That EPA later adopted a different interpretation, requiring wells to be closer to the current waste disposal area, is irrelevant. EPA's interpretation at the time of the alleged violation controls. Internorth, Inc. v. Department of Energy, 548 F.Supp. 987, 995 (D. Del. 1982).

The courts below failed to give sufficient weight to the lack of precision in and complexity of the groundwater monitoring regulations and the consequent necessity for EWC to rely upon expert consultants. No formal final guidance was available from EPA until 1986. To comply

with these regulations, EWC hired nationally known expert consultants and followed their advice. All the consultants who have assessed EWC's 1985 system concur that the system complied with the regulations. Tr. 2394, 2405. EWC did not disregard its duties under RCRA, but rather did the best it could in an uncertain area.

C. Even if the determinations below that EWC had lost interim status were correct, that is no basis to impose total forfeiture of EWC's right to operate under interim status.

The courts below, without extended analysis, accepted EPA's position that EWC's efforts in 1985 and later to comply with the insurance and groundwater monitoring regulations were irrelevant, and that if compliance was not total on the certification date in 1985, FCL must close. Dist. Ct. at 165, App. Ct. at 11. This, too, is a question of first impression with important implications for many RCRA and

other environmental cases. There is no sound reason loss of interim status should be automatic (unaffected by good faith compliance efforts), and permanent.

The statute requires only a certification of compliance. 42 U.S.C. § 6925(e)(2). Congress could have, but did not, expressly require total compliance. The head of EPA's hazardous waste program told the regulated community less than four weeks before November 8, 1985 that EPA "probably will accept certification for facilities that have made a good faith effort to comply," and would "work with" such facilities. 16 Env.'t Rep. 1022 (October 11, 1985). Of course, EPA's construction of § 6925(e) does not control on whether physical compliance is required. Its construction is relevant only if the statute is ambiguous, and the requirement of 6925(e)(2) for certification only is

clear.

This is not a suggestion that environmental violations be 'excused," as the Seventh Circuit suggests, but that the drastic consequence of total and permanent forfeiture of a valuable enterprise should not follow automatically from a later determination of non-compliance.[10] The forfeiture imposed by the courts below conflicts directly with the balanced approach this Court has endorsed in Romero-Barcelo and other decisions. What sense is there in destroying a useful facility because of a temporary shortfall in coverage which caused no harm? The same result holds for groundwater monitoring. What else could EWC reasonably do, when told by reputable consultants that it had

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[10]The law properly disfavors strict forfeiture of valuable rights. See, e.g., Howard v. Federal Crop. Ins. Corp., 540 F.2d 675, 687 (4th Cir. 1976).

installed an adequate system and was blocked from doing more by N-128? Even if EWC's groundwater certification was not in good faith, it still makes no sense to use that alleged past shortcoming to destroy FCL just at the moment EWC has installed a huge new monitoring system both regulatory agencies have endorsed.

A more balanced approach would restore sense and fairness to a determination which otherwise might be used selectively against politically unpopular targets.[11] Even if interim status is once lost, why should it not be capable of restoration after, as happened here, indisputably adequate insurance and an approved groundwater monitoring system are obtained? In Romero-Barcelo, this Court assessed a statute

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[11]EPA has entered into consent decrees with other facilities not in compliance on November 8, 1985, allowing them to continue to operate despite loss of interim status. Dist. Ct. at 162-63.

which states no discharge may be made into the ocean without a permit. The Navy did not have the required permit. This Court nonetheless held that a balancing of interests must occur, that an injunction barring the Navy from discharging without a permit was not automatically required.

The courts below have applied the absolute, unbalanced approach towards interim status Romero-Bercelo and Gambell reject. The same policy reasons should be applied by this Court in this critical RCRA case of first impression.

III.

The district court lacked subject matter jurisdiction over STOP's claims and erroneously granted STOP's motion to intervene.

A. STOP failed to give the prefiling notice required by RCRA.

STOP's claims beyond those which copied EPA, including its request for an

unprecedented and unlawful permanent closure injunction, never should have been entertained by the district court. The district court lacked subject matter jurisdiction because STOP failed to give the jurisdictional pre-filing notice to the State of Indiana required by 42 U.S.C. § 6972(b)(1). This presents an important issue of federal law with broad implication for a large body of pending and future environmental litigations. Further, the decisions below conflict with the policy on RCRA notice recently enunciated by this Court in Hallstrom v. Tillamook, ___ U.S. ___, 110 S.Ct. 304 (1989).

Section 6972(b)(1) provides in relevant part:

> (1) No action may be commenced under subsection (a)(1)(A) of this section -
>
> (A) prior to 60 days after the plaintiff has given notice of the violation to -- (i) the Administrator; (ii) the State in which the alleged violation occurs; and (iii) to any alleged violator

> of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter;

As the district court held:

> STOP's role in this case has exceeded that of a mere intervenor. STOP has presented its own claims and sought relief beyond that sought by EPA. STOP's additional claims must be viewed more properly as having been in the nature of citizen's suit under 6972(a)(1)(A).

Dist. Ct. at 29. The district court proffered three reasons why STOP's non-compliance with the notice provision should not bar STOP's additional claims.[12] First, the district court noted that § 6972(b)(1) required STOP to provide notice only "immediately" before filing and reasoned

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[12]Both EWC and EPA cited Hallstrom, decided after the district court's judgment, but the Seventh Circuit did not address Hallstrom or EWC's jurisdictional argument, instead adopting the district court's opinion. App. Ct. at 5.

that the "rationale" for requiring notice -- to allow for administrative agencies to act -- was absent in immediate notice cases. Dist. Ct. at 32-33. This holding directly conflicts with Hallstrom.

In Hallstrom, this Court was asked to decide whether the notice required under 42 U.S.C. §6972(b)(1) was mandatory and jurisdictional, or whether it could be waived. The circuits were split. This Court held:

> the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a District Court may not disregard these requirements at its discretion . . .

110 S.Ct. at p. 311. Although Hallstrom concerned the 60-day notice provision, this Court emphasized that courts are bound by the literal language of the statute. When Congress requires notice, notice is required. Federal district courts cannot rewrite a statute

based on their view of the likely course of the administrative process.[13]

The district court's second escape from the notice requirement also conflicts with Hallstrom and highlights a conflict between the circuits. The district court held that "notice-in-fact," rather than actual notice, of STOP's claims to the state was sufficient. Dist.Ct., p.36-37. The court adopted the "pragmatic approach" adopted by the Second, Third, Eighth, and District of Columbia Circuits instead of the "jurisdictional prerequisite approach" of the First, Sixth, Seventh, and Ninth Circuits. In Hallstrom, this Court expressly rejected the pragmatic approach

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[13]In Hallstrom this Court declined to decide whether RCRA's notice provisions are "jurisdictional in the strict sense of the term." Here, that determination may be necessary. Even though the district court's decision clearly conflicts with Hallstrom, this Court may now settle whether RCRA notice is jurisdictional.

to 6972(b)(1). 110 S.Ct. at p. 309.

The final way the district court attempts to save jurisdiction is by claiming ancillary jurisdiction over STOP's claims. The district court held that:

> when the right to intervene is absolute, no independent ground of federal jurisdiction need be shown to support the intervention; the intervention is properly regarded as coming within the court's ancillary jurisdiction.

Dist. Ct. at 37. However, at least one other Circuit has squarely held that the intervention provision relied upon by STOP, 42 U.S.C. §9613(i), does not provide an absolute right to intervene. Travelers Indemnity Co. v. Dingwell, 884 F.2d 629, 641 (1st Cir. 1989). There is thus a significant conflict between the First and Seventh Circuits on the nature of § 9613(i) intervention.

B. The courts below erroneously refused even to consider EWC's opposition to STOP's intervention.

In allowing STOP to intervene, the district court relied on § 9613(i), which states that in actions like this one:

> any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

As numerous courts have recognized, § 9613(i) mirrors nearly identical language in Fed. R. Civ. Pro. 24(a)(2). United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1985).

Under Rule 24(a)(2), the courts have fashioned a four-part test. The would-be intervenor's petition must:

> 1) be timely; 2) claim an interest relating to the subject property or transaction; 3) demonstrate that the applicant is

> so situated that the disposition of the action may as a practical matter impede or impair his ability to protect that interest; and 4) show that the applicant's interest is not already adequately represented by existing parties."

Dingwell, supra, 884 F.2d at 637. Further, "[a]n applicant who fails to meet any one of these requirements cannot intervene as of right under Rule 24(a)(2)." Id. The only difference between Fed. R. Civ. P. 24(a)(2) and 42 U.S.C §9613(i) is that the latter shifts the burden of proving inadequate representation (the fourth prong of the test) away from the intervenor. United States v. Acton Corporation, 131 F.R.D. 431 (D.N.J. 1990).

STOP attempted to satisfy the test by asserting two "interests," namely alleged personal injury and property damage caused by FCL. STOP concluded, without any supporting argument, that STOP

> is so situated that the disposition of the action may, as a practical matter, impair or impede STOP's

> ability to protect those interests of its members unless STOP is permitted to intervene . . .

EWC vigorously objected,[14] but the district court refused to consider EWC's objections, stating:

> [i]t appears from the statute [referring to §9613(i)] that the only party authorized to respond to STOP's motion is the President or the State and therefore absent any opposition from the government STOP will be granted leave to intervene.

(November 6, 1987 Memorandum and Order, attached in the Appendix.) The district courts final decision repeats the point. Dist. Ct. at 27.

If this interpretation of § 9613(i) is perpetuated, virtually anyone will be able to intervene in an EPA enforcement action unless EPA objects. The defendant -- the

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[14]The personal injury and property damage interests alleged by STOP already were being litiated in an Indiana state court action entitled Edward Allen Jr., et al. v. Environmental Waste Control, Inc., et al., Cause No. 75-CO1-8709-CP-368.

party most affected by intervention -- will be unable to raise any objection. Surely Congress did not intend this result when it enacted § 9613(i).

CONCLUSION

For all the reasons stated above, the petition for certiorari should be granted.[15]

Respectfully submitted,

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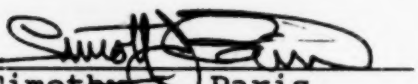
By 
Timothy J. Paris,
Counsel of Record

January 28, 1991

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[15]There are several errors below -- the excessive penalty, the adjudged inadequacy of EWC's groundwater monitoring system at the start of trial, the award of attorney fees to STOP, and the alleged unlawful lateral expansion of the FCL -- which are not the basis of EWC's current petition but which EWC does not waive and anticipates would be addressed on the merits or mooted by the relief EWC would obtain after consideration of this petition. Other matters, such as the corrective action, which has been commenced by EWC, have been mooted.

APPENDIX OF STATUTES AND REGULATIONS

42 U.S.C. § 6925(2) - In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility --

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

42 U.S.C. 6928(h)(1) - Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

42 U.S.C. 6972(a)(1)(A) - Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf --

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter;

42 U.S.C. 6972(b)(1) - No action may be commenced under subsection (a)(1)(A) of this section --

(A) prior to 60 days after the plaintiff has given notice of the violation to --

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of suc permit, standard, regulation condition, requirement, prohibition, o order,

except that such action may be brough immediately after such notification in th case of an action under this sectio respecting a violation of subchapter III o this chapter; or

(B) if the Administrator or State ha commenced and is diligently prosecuting civil or criminal action in a court of th United States or a State to requir compliance with such permit, standard regulation, condition, requirement prohibition, or order.

In any action under subsection (a)(1)(A) o this section in a court of the Unite

States, any person may intervene as a matter of right.

42 U.S.C. 9613(i) - In any action commenced under this chapter or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

40 C.F.R. § 265.93(d)(1) and (d)(2) and (f)

(d)(1) If the analyses performed under paragraph (c)(2) of this section confirm the significant increase (or pH decrease), the owner or operator must provide written notice to the Regional Administrator -- within seven days of the date of such confirmation -- that the facility may be affecting groundwater quality.

(2) Within 15 days after the notification under paragraph (d)(1) of this section, the owner or operator must develop and submit to the Regional Administrator a specific plan, based on the outline required under paragraph (a) of this section and certified by a qualified geologist or geotechnical engineer, for a ground-water quality assessment program at

the facility.

(f) Unless the ground water is monitored to satisfy the requirement of § 265.93(d)(4), at least annually the owner or operator must evaluate the data on ground-water surface elevations obtained under § 265.92(e) to determine whether the requirements under § 265.91(a) for locating the monitoring wells continues to be satisfied. If the evaluation shows that § 265.91(a) is no longer satisfied, the owner or operator must immediately modify the number, location, or depth of the monitoring wells to bring the ground-water monitoring system into compliance with this requirement.

320 IAC 4.1-20-2 Groundwater monitoring system

Authority: IC 13-7-7; IC 13-7-8.5-4

Affected: IC 13-7-8.5

Sec. 2. (a) A groundwater monitoring system must be capable of yielding groundwater samples for analysis and must consist of:

(2) monitoring wells (at least three) installed hydraulically downgradient (i.e., in the direction of decreasing static head) at the limit of the waste management area. Their number, locations, and depths must ensure that they immediately detect any statistically significant amount so hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer.

320 IAC 4.1-22-34(e)

(e) Any other termination of this endorsement will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Technical Secretary.

320 IAC 4.1-22-35(e)

(e) Any other termination of the insurance will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the Technical Secretary.

320.1 IAC 2-22-24 Liability requirements

Authority: IC 13-7-8.5-4

Affected: IC 13-7-8.5-5; IC 13-7-10-1

Sec. 24. (a) Coverage for sudden accidental occurrences. After July 1, 1982, an owner or operator of a hazardous waste treatment, storage, or disposal facility or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least one million dollars per occurrence with an annual aggregate of at least two million dollars, exclusive of legal defense costs. This liability

coverage may be demonstrated in one of three ways, as specified in 320 IAC 4.1-22-24(a)(1), (a)(2) and (a)(3):

(b) Coverage for nonsudden accidental occurrence. An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least three million dollars per occurrence with an annual aggregate of at least six million dollars, exclusive of legal defense costs. This liability

coverage may be demonstrated in one of three ways, as specified in 320 IAC 4.1-22-24(b)(1), (b)(2) and (b)(3):

329 IAC 3-34-5 Contents of final (state) permit application: general requirements

Authority: IC 13-7-7;IC 13-7-8.5-4

Affected: IC 13-7-8.5; 40 CFR 270.14

Sec. 5. (a) The final permit application consists of the general information requirements of this section, and the specific information requirements in 329 IAC 3-34-5 through 329 IAC 3-34-12 applicable to the facility. The final permit application information requirements presented in 329 IAC 3-34-5 through 329 IAC 3-34-12 reflect the standards promulgated in 329 IAC 3-40-through 329 IAC 3-54. These information requirements are necessary in order for the commissioner to determine compliance with those standards contained in 329 IAC 3-40 through 329 IAC

3-54. If owner and operators of hazardous waste management facilities can demonstrate that the information prescribed in the final permit application information requirements cannot be provided to the extent required, the commissioner may make allowance for submission of such information on a case-by-case basis. Information required in the final permit application information requirements shall be submitted to the commissioner and signed in accordance with requirements in 329 IAC 3-34-2. Certain technical data, such as design drawings and specifications, and engineering studies shall be certified by a registered professional engineer.

(b) General information requirements. The following information is required for all HWM facilities, except as 329 IAC 3-40-1 provides otherwise:

(1) A general description of the facility.

(2) Chemical and physical analyses of the hazardous waste to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store, recover, or dispose of the waste properly in accordance with applicable portion of 329 IAC 3-40- through 329 IAC 3-54.

(3) A copy of the waste analysis plan required by 329 IAC 3-41-4(b) and, if applicable 329 IAC 3-41-4(c).

(4) A description of the security procedures and equipment required by 329 IAC 3-41-5, or a justification demonstrating the reasons for requesting a

waiver of this requirement.

(5) A copy of the general inspection schedule required by 329 IAC 3-41-6(b); include where applicable, as part of the inspection schedule, specific requirements in 329 IAC 3-48-5, 329 IAC 3-49-4(i), 329 IAC 3-49-6, 329 IAC 3-50-3, 329 IAC 3-51-3, 329 IAC 3-52-4, and 329 IAC 3-53-3.

(6) A justification of any request for a waiver(s) of the preparedness and prevention requirements of 329 IAC 3-42.

(7) A copy of the contingency plan required by 329 IAC 3-43.

[Note: Include, where applicable, as part of the contingency plan, specific requirements in 329 IAC 3-50-5.]

(8) A description of procedures, structures, or equipment used at the facility to:

(A) prevent hazards in unloading operations (for example, ramps, special forklifts);

(B) prevent runoff from hazardous waste handling areas to other areas of the facility or environment, or to prevent flooding (for example berms, dikes, trenches);

(C) prevent contamination of water supplies;

(D) mitigate effects of equipment failure and power outages; and

(E) prevent undue exposure of personnel to hazardous waste (for example, protective clothing).

(9) A description of precautions to prevent accidental ignition or reaction of ignitable, reactive, or incompatible wastes as required to demonstrate compliance with 329 IAC 3-41-8 including documentation demonstrating compliance with 329 IAC 3-41-8(c).

(10) Traffic pattern, estimated volume (number, types of vehicles) and control (for example, show turns across traffic lanes, and stacking lanes (if appropriate); describe access road surfacing and load bearing capacity; show traffic control signals).

(11) Facility location information:

(A) In order to determine the applicability of the seismic standard (329 IAC 3-41-9(a)) the owner or operator of a new facility must identify the political jurisdiction, e.g., county, township, or election district in which the facility is proposed to be located.

[Note: If the county or election district is not listed in 329 IAC 3-32-6, no further information is required to demonstrate compliance with 329 IAC 3-41-9(a).]

(B) If a facility is proposed to be located in an area listed in 329 IAC 3-32-6, the owner or operator shall demonstrate compliance with the seismic standard. This demonstration may be made using either published geologic

data or data obtained from field investigations carried out by the applicant. The information provided must be of such quality to be acceptable to geologists experienced in identifying and evaluating seismic activity. The information submitted must show that either:

(i) No faults which have had displacements in Holocene time are present, or no lineations which suggest the present of a fault (which have displacement in Holocene time) within three thousand (3,000) feet of a facility are present, based on data from:

(AA) published geologic studies;

(BB) aerial reconnaissance of the area within a 5-mile radius from the facility;

(CC) an analysis of aerial photographs covering a 3,000-radius of the facility; and

(DD) if needed to clarify the above data, a reconnaissance based on walking portions of the area within three thousand (3,000) feet of the facility; or

(ii) If faults (to include lineations) which have had displacement in Holocene time are present within three thousand (3,000) feet of a facility, no faults pass within two hundred (200) feet of the portions of the facility where

treatment, recovery, storage, or disposal of hazardous waste will be conducted, based on data from a comprehensive geologic analysis of the site. Unless a site analysis is otherwise conclusive concerning the absence of faults within two hundred (200) feet of such portions of the facility, data shall be obtained from a subsurface exploration (trenching) of the area within a distance no less than two hundred (200) feet from portions of the facility where treatment, storage, recovery, or disposal of hazardous waste will be conducted. Such trenching shall be performed in a direction that is perpendicular to known faults (which have had displacement in Holocene time)

passing within three thousand (3,000) feet of the portions of the facility where treatment, storage, or disposal of hazardous waste will be conducted. Such investigation shall document the location of faults found with supporting maps and other analyses.

[Note: The EPA guidance manual for the location standards provides greater detail on the content of each type of seismic investigation and the appropriate condition under which each approach or a combination of approaches would be used.]

(C) Owners and operators of all facilities shall provide an identification of whether the facility is located within a 100-year

floodplain. This identification must indicate the source of data for such determination and include a copy of the relevant federal insurance Administration (FIA) flood map, if used, or the calculations and maps used where an FIA map is not available. Information shall also be provided identifying the 100-year flood level and any other special flooding factors, e.g., wave action which must be considered in designing, constructing, operating, or maintaining the facility to withstand washout from a 100-year flood.

Where maps for the National Flood Insurance Program produced by the Federal Insurance Administration (FIA) of the Federal Emergency Management Agency are available, they will

normally be determinative of whether a facility is located within or outside of the 100-year floodplain. However, where the FIA map excludes an area (usually areas of the floodplain less than two hundred (200) feet in width), these areas must be considered and a determination made as to whether they are in the 100-year floodplain. Where FIA maps are not available for a proposed facility location, the owner or operator must use equivalent mapping techniques to determine whether the facility is within the 100-year floodplain, and if so located, what the 100-year flood elevation would be.

(D) Owners and operators of facilities located in the 100-year floodplain must provide the following information:

(i) Engineering analysis to indicate the various hydrodynamic and hydrostatic forces expected to result at the site as consequence of a 100-year flood.,

(ii) Structural or other engineering studies show the design of operational units, e.g., tanks, incinerators and flood protection devices, e.g., floodwalls, dikes at the facility and how these will prevent washout.

(iii) If applicable, and in lieu of items (A) and (B) above, a detailed description of procedures to be followed to remove hazardous waste to safety before the facility is flooded, including:

(AA) Timing of such movement relative to flood levels, including estimated time to move the waste, to show that such movement can be completed before floodwaters reach the facility.

(BB) A description of the location(s) to which the waste will be moved and demonstration that those facilities will be eligible to receive hazardous waste in accordance with 329 IAC 3-33 through 329 IAC 3-54.

(CC) The planned procedures, equipment, and personnel to be used and the means to ensure that such resources will be available in time for use.

(DD) The potential for accidental discharges of the waste during movement.

(E) Existing facilities not in compliance with 329 IAC 3-41-9(b) shall provide a plan showing how the facility will be brought into compliance and a schedule for compliance.

(12) An outline of both the introductory and continuing training programs by owners or operators to prepare persons to operate or maintain the hazardous waste management facility in a safe manner as required to demonstrate compliance with 329 IAC 3-41-7. A brief description of how training will be designed to meet actual job tasks in accordance with requirements in 329 IAC 3-41-7(a)(3).

(13) A copy of the closure plan and where applicable, the post-closure plan required by 329 IAC 3-46-3, 329 IAC 3-46-9, and 329 IAC 3-49-8. Include, where applicable, as part of the plans, specific requirements in 329 IAC 3-48-9, 329 IAC 3-49-8, 329 IAC 3-50-5, 329 IAC 3-51-6, 329 IAC 3-52-8, 329 IAC 3-53-5 and 329 IAC 3-54-8.

(14) For hazardous waste disposal units that have been closed, documentation that notices required under 329 IAC 3-46-10 have been filed.

(15) The most recent closure cost estimate for the facility prepared in accordance with 329 IAC 3-47-3 and a copy of the documentation required to demonstrate financial assurance under 329 IAC 3-47-4. For a new facility, a copy of

the required documentation may be submitted sixty (60) days prior to the initial receipt of hazardous wastes, if that is later than the submission of the Part B.

(16) Where applicable, the most recent post-closure cost estimate for the facility prepared in accordance with 329 IAC 3-47-5 plus a copy of the documentation required to demonstrate financial assurance under 329 IAC 3-47-6. For a new facility, a copy of the required documentation may be submitted sixty (60) days prior to the initial receipt of hazardous wastes, if that is later than the submission of the Part B.

(17) Where applicable, a copy of the insurance policy or other documentation which comprises compliance with the requirements of 329 IAC 3-47-8. For a new

facility, documentation showing the amount of insurance meeting the specification of 329 IAC 3-47-8(a) and, if applicable, 329 IAC 3-47-8(b), that the owner or operator plans to have in effect before initial receipt of hazardous waste for treatment, storage, recovery, or disposal. A request for a variance in the amount of required coverage, for a new or existing facility, may be submitted as specified in 329 IAC 3-47-8(c).

(18) A topographic map showing a distance of one thousand (1,000) feet around the facility at a scale of 2.5 centimeters (one (1) inch) equal to not more than 61.0 meters (two hundred (200) feet). Contours must be shown on the map. The contour interval must be sufficient to clearly show the pattern of surface water flow in the vicinity of and from each

operational unit of the facility. For example, contours with an interval of 1.5 meters (five (5) feet), if relief is greater than 6.1 meters (twenty (20) feet), or an interval of 0.6 meters (two (2) feet), if relief is less than 6.1 meters (twenty (20) feet). Owners and operators of HWM facilities located in mountainous areas should use large contour intervals to adequately show topographic profiles of facilities. The map shall clearly show the following:

(A) Map scale and date.

(B) 100-year floodplain area.

(C) Surface waters including intermittant [sic.] streams.

(D) Surrounding land uses (residential, commercial, agricultural, recreational).

(E) A wind rose, i.e., prevailing wind-speed and direction.

(F) Orientation of the map (north arrow).

(G) Legal boundaries of the HWM facility site.

(H) Access control (fences, gates).

(I) Injection and withdrawal wells both on-site and off-site.

(J) Buildings; treatment, storage, recovery, or disposal operations; or other structures (recreation areas,

runoff control systems, access and internal roads, storm, sanitary, and process sewerage systems, loading and unloading areas, fire control facilities, etc.).

(K) Barriers for drainage or flood control.

(L) Location of operational units within the HWM facility site, where hazardous waste is (or will be) treated, stored, recovered, or disposed (include equipment cleanup areas).

For large hazardous waste management facilities the commissioner may allow the use of other scales on a case-by-case basis.

(19) Applicants may be required to submit such information as may be necessary to enable the commissioner to carry out the requirements of IC 13-7.

(c) Additional information requirements. The following additional information regarding protection of groundwater is required from owners or operators of hazardous waste surface impoundments, piles, land treatment units, and landfills except as provided in 329 IAC 3-45-1(b):

(1) A summary of the groundwater monitoring data obtained during the interim status period under 329 IAC 3-20-1 through 329 IAC 3-20-5, where applicable.

(2) Identification of the uppermost aquifer and aquifers hydraulically interconnected beneath the facility

property, including groundwater flow direction and rate, and the basis for such identification, i.e., the information obtained from hydrogeologic investigations of the facility area.

(3) On the topographic map required under subdivision (b)(18) of this section, a delineation of the waste management area, the property boundary, the proposed "point of compliance" as defined under 329 IAC 3-45-6, the proposed location of groundwater monitoring wells as required under 329 IAC 3-45-8, and to the extent possible, the information required in subdivision (c)(2) of this section.

(4) A description of any plume of contamination that has entered the groundwater from a regulated unit at the time that the application was submitted

that:

(A) delineates the extent of the plume on the topographic map required under subdivision (b)(18) of this section;

(B) identifies the concentration of each 329 IAC 3-6-9 constituent throughout the plume or identifies the maximum concentrations of 329 IAC 3-6-9 constituent in the plume.

(5) Detailed plans and an engineering report describing the proposed groundwater monitoring program to be implemented to meet the requirements of 329 IAC 3-45-8.

(6) If the presence of hazardous constituents has not been detected in the groundwater at the time of permit application, the owner or operator must

submit sufficient information, supporting data, and analyses to establish a detection monitoring program which meets the requirements of 329 IAC 3-45-9. This submission must address the following items specified under 329 IAC 3-45-9:

(A) a proposed list of indicator parameters, waste constituents, or reaction products that can provide a reliable indication of the presence of hazardous constituents in the groundwater;

(B) a proposed groundwater monitoring system;

(C) background values for each proposed monitoring parameter or constituent, or procedures to calculate such values; and

(D) a description of proposed sampling, analysis and statistical comparison procedures to be utilized in evaluating groundwater monitoring data.

(7) If the presence of hazardous constituents has been detected in the groundwater at the point of compliance at the time of the permit application, the owner or operator must submit sufficient information, supporting data, and analyses to establish a compliance monitoring program which meets the requirements of 329 IAC 3-45-10. Except as provided in 329 IAC 3-45-9(h)(5), the owner or operator must also submit an engineering feasibility plan for a corrective action program necessary to meet the requirements of 329 IAC 3-45-11, unless the owner or operator obtains written authorization in advance from the

Commissioner to submit a proposed permit schedule for submittal of such a plan. To demonstrate compliance with 329 IAC 3-45-10, the owner or operator must address the following items:

(A) a description of the wastes previously handled at the facility;

(B) a characterization of the contaminated groundwater, including concentrations of hazardous constituents;

(C) a list of hazardous constituents for which compliance monitoring will be undertaken in accordance with 329 IAC 3-45-8 and 329 IAC 3-45-10;

(D) proposed concentration limits for each hazardous constituent, based on

the criteria set forth in 329 IAC 3-4-5 - 5(a), including a justification for establishing any alternate concentration limits;

(E) detailed plans and an engineering report describing the proposed groundwater monitoring system, in accordance with the requirements of 329 IAC 3-45-8; and

(F) a description of proposed sampling, analysis and statistical comparison procedures to be utilized in evaluating groundwater monitoring data.

(8) If hazardous constituents have been measured ~~in~~ the groundwater which exceed the concentration limits established under 329 IAC 3-45-5 Table 1, or if

groundwater monitoring conducted at the time of permit application under 329 IAC 3-45-1 through 329 IAC 3-45-5 at the waste boundary indicates the presence of hazardous constituents from the facility in groundwater over background concentrations, the owner or operator must submit sufficient information, supporting data, and analyses to establish a corrective action program which meets the requirements of 329 IAC 3-45-11. However, an owner or operator is not required to submit information to establish a corrective action program if he demonstrates to the commissioner that alternate concentration limits will protect human health and the environment after considering the criteria listed in 329 IAC 3-45-5(b). An owner or operator who is not required to establish a corrective action program for this reason must instead submit sufficient information

to establish a compliance monitoring program which meets the requirements of 329 IAC 3-45-10 and subdivision (c)(6) of this section. To demonstrate compliance with 329 IAC 3-45-11, the owner or operator must address, at a minimum, the following items:

(A) a characterization of the contaminated groundwater, including concentrations of hazardous constituents;

(B) the concentration limit for each hazardous constituent found in the groundwater as set forth in 329 IAC 3-45-5;

(C) detailed plans and an engineering report describing the corrective action to be taken; and

(D) a description of how the groundwater monitoring program will demonstrate the adequacy of the corrective action;

(E) the permit may contain a schedule for submittal of the information required in clauses (c)(8)(C) and (D) provided the owner or operator obtains written authorization from the commissioner prior to submittal of the permit application.

329 IAC 3-34-12 Specific final (state) permit application information requirements for landfills

Authority: IC 13-7-7; IC 13-7-8.5

Affected: IC 13-7-8.5; 40 CFR 270.21

Sec. 12. Except as otherwise provided in 329 IAC 3-40-1, owners and operators of facilities that dispose of hazardous waste in landfills must provide the following additional information:

(1) A list of the hazardous waste placed or to be placed in each landfill or landfill cell.

(2) Detailed plans and an engineering report describing how the landfill is or

will be designed, constructed, operated and maintained to comply with the requirements of 329 IAC 3-53-2. This submission must address the following items as specified in 329 IAC 3-53-2:

(A) The liner system and leachate collection and removal system (except for an existing portion of a landfill). If an exemption from the requirements for a liner and a leachate collection and removal system is sought as provided by 329 IAC 3-53-2(b), submit detailed plans and engineering and hydrogeologic reports, as appropriate, describing alternate design and operating practices that will, in conjunction with location aspects, prevent the migration of any hazardous constituent into the ground water or surface water at any future time.

(B) Control of run-on.

(C) Control of run-off.

(D) Management of collection and holding facilities associated with run-on and run-off control systems.

(E) Control of wind dispersal of particulate matter, where applicable.

(3) A description of how each landfill, including the liner and cover systems, will be inspected in order to meet the requirements of 329 IAC 3-53-3(a) and (b). This information should be included in the inspection plan submitted under 329 IAC 3-34-5(b)(5).

(e) [sic.] Detailed plans and an engineering report describing the final cover which will be applied to each landfill or landfill cell at closure in accordance with 329 IAC 3-53-5(a), and a description of how each landfill will be maintained and monitored after closure in accordance with 329 IAC 3-53-5(b). This information should be included in the closure and post-closure plans submitted under 329 IAC 3-34-5(b)(13).

(4) If ignitable or reactive wastes will be landfilled, an explanation of how the standards of 329 IAC 3-53-6 will be complied with.

(5) If incompatible wastes, or incompatible wastes and materials will be landfilled, an explanation of how 329 IAC 3-53-7 will be complied with.

(6) If bulk or non-containerized liquid waste or wastes containing free liquids is to be landfilled prior to May 8, 1985, an explanation of how the requirements of 329 IAC 3-53-8 will be complied with.

(7) If containers of hazardous waste are to be landfilled, an explanation of how the requirements of 329 IAC 3-53-9 or 329 IAC 3-53-10, as applicable, will be complied with.

(8) A waste management plan for EPA Hazardous Waste Nos. F020, F021, F022, F023, F026, and F027 describing how a landfill is or will be designed, constructed, operated, and maintained to meet the requirements of 329 IAC 3-53-11. This submission must address the following

items as specified in 329 IAC 3-53-11:

(A) the volume, physical, and chemical characteristics of the wastes, including their potential to migrate through soil or to volatilize or escape into the atmosphere;

(B) the attenuative properties of underlying and surrounding soils or other materials;

(C) the mobilizing properties of other materials co-disposed with these wastes; and

(D) the effectiveness of additional treatment, design, or monitoring techniques.